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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Unit 3, Intermountain Power Service Corporation, Millard County, Utah DAQE-AN0327010-04	EXECUTIVE SECRETARY'S MEMORANDUM IN OPPOSITION TO SIERRA CLUB'S MOTION FOR LEAVE TO AMEND REQUEST FOR AGENCY ACTION

The Executive Secretary of the Utah Air Quality Board ("Executive Secretary") hereby files this Memorandum in Opposition to Sierra Club's Motion for Leave to Amend its Request for Agency Action dated February 16, 2007. The Executive Secretary opposes the amendment because (1) Sierra Club's motion is untimely, and (2) the Executive Secretary complied with applicable law. Accordingly, the Executive Secretary respectfully requests that Sierra Club's motion be denied.

INTRODUCTION

Sierra Club seeks leave from the Utah Air Quality Board (the "Board") to amend its Request for Agency Action ("RFA") dated November 16, 2004. Sierra Club's RFA contests the Approval Order issued by the Executive Secretary to Intermountain Power Service Corporation ("IPSC") on October 15, 2004. Sierra Club now seeks leave to amend its RFA to add a cause of action which would provide an entirely new basis for invalidating the Approval Order, wholly distinct from the cause of action in the original RFA. Sierra Club's proposed amendment claims that according to state and federal regulation, the IPSC Approval Order is now invalid because

more than 18 months (from the date of issuance of the AO) have passed without IPSC beginning construction on the project, and without an extension by the Executive Secretary. This proposed amendment is completely distinct from all the other claims in the RFA. As the Executive Secretary will demonstrate, the Board should deny Sierra Club's proposed amendment because 1) Sierra Club's motion is untimely, and 2) the factual basis for Sierra Club's new cause of action is erroneous.

ARGUMENT

A. Amendment Should not be Allowed Because It Would Not Withstand a Motion to Dismiss

It is well settled that "[l]eave to file an amended complaint should be denied when movant seeks to assert a new claim that is illegally insufficient or futile." Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1046 (Utah Ct. App. 1994). Moreover, "'. . . . a court may deny a motion to amend as futile if the proposed amendment would not withstand a motion to dismiss . . . .'" Jensen v. IHC Hospitals, Inc., 82 P.3d 1076, 1102 (Utah 2003), *quoting* Acker v. Burlington N. and Santa Fe Ry., Co., 215 F.R.D. 645, 647 (D.Kan.2003).

Sierra Club's proposed new would be futile because 1) the claim is time-barred and 2) Sierra Club's alleged factual basis for the new cause of action is erroneous.

1. Sierra Club's Claim is Untimely

Sierra Club filed its RFA pursuant to Utah Admin. Code R307-103-3. Subsection (3) of that rule provides in pertinent part that "[a] request for agency action . . . shall, to be timely, be received for filing within 30 days of the issuance of the initial order or notice of violation." It is further well-settled that "[w]hen a cause of action set forth in an amended pleading is new, different, and distinct from that originally set up, there is not relation back [to the original action], and the amendment is equivalent to the filing of a new action. Peterson v. Union Pac. R.

Co., 8 P.2d 627, 630 (Utah 1932). Since Sierra Club's new claim would be introducing a "new, different, and distinct" cause of action, for timeliness purposes it needs to be treated as if it were a separate Request for Agency Action. Acknowledging the 30 day filing requirement under R307-103-3, Sierra Club asserts that this requirement does not apply because its new claim is based on an alleged "automatic expiration of the permit, and not to a particular action of the Executive Secretary," and that therefore, there is no time limitation for Sierra Club to make such a filing. *Id.* In its Motion for Summary Judgment, Sierra Club bases this argument on the faulty proposition that 40 C.F.R. § 52.21(r) applies to the Approval Order. That federal regulation states in pertinent part that "[a]pproval to construct shall become invalid if construction is not commenced within 18 months of receipt of such approval . . . ." 40 C.F.R. § 52.21(r)(2).

Sierra Club's proposed amendment alleges that "twenty eight months have passed since the Executive Secretary signed the Approval Order for the proposed plant," and that "the AO is now invalid, having expired automatically on or about April 15, 2006." *See* Sierra Club proposed First Amended Request for Agency Action at 21. This contention has no merit because the Board did not incorporate this federal regulation into the Utah Air Rules (at R307-405-19(1)) until the March 2006 Air Quality Board meeting, to become effective in June 2006.[1] Because this federal regulation was not part of the Utah Air Rules at the time the Executive Secretary issued the Approval Order, the Approval Order was not subject to the federal regulation.

Consequently, Sierra Club is left only with Utah Air Rule R307-401-18 and Condition No. 8 of the Approval Order, both of which endow the Executive Secretary with broad discretion to revoke the Approval Order if construction has not commenced after 18 months. Since neither of these provisions mandate an automatic expiration of the approval order, there would be no

[1]See Exhibit A. This exhibit contains the amendments proposed to the Utah Air Quality Board at the March 2006 Air Quality Board meeting. It includes both the original rules and the proposed amendments that were ultimately adopted by the Board.

automatic expiration of the Approval Order as Sierra Club asserts. Since Sierra Club cannot rely on an inapplicable federal regulation, its only avenue to contest an alleged violation of R307-401-18 is only through a new request for agency action, and thus, the 30 day filing requirement.

Sierra Club seeks to justify its delay in acting on the alleged violation by claiming that it was not on notice of the Executive Secretary's actions until it received the administrative record on February 15, 2007. This argument is wholly unpersuasive. The administrative record is only as broad as the allegations in Sierra Club's RFA, which (up until its current effort to amend) did not contain any cause of action relating to any 18 month review. Anything beyond those allegations is not relevant to the claims of Sierra Club's RFA, and thus is not properly part of the administrative record. Because there would be no reasonable expectation that the administrative record would contain any documentation concerning a 18 month review, Sierra Club's claim that it could not act without first having reviewed the administrative record is without justification.

Furthermore, nothing prevented Sierra Club from inquiring through a government records (GRAMA) request back in April 2006, particularly considering its familiarity with the rules and its past actions in this case. For example, in October 2004, Sierra Club filed a lengthy GRAMA request with the Division of Air Quality to obtain documents it believed relevant to its case. *See* Exhibit B, attached. Sierra Club's proactive past actions are inconsistent with its current assertion that it was powerless to determine the facts underlying its new cause of action until after it had received the administrative record. Further, even allowing Sierra Club the benefit of the doubt in April 2006 because its status as a party was on appeal, the Utah Supreme Court issued its standing decision on November 21, 2006, and Sierra Club did not file its motion to amend until February 16, 2007, some 87 days after it was granted standing. Under either timeline, Sierra Club's amendment is time-barred as a matter of law.

2. <u>The Executive Secretary Complied with the Applicable State Rule</u>

In addition to being untimely, Sierra Club's claim would not survive a motion to dismiss because there is no basis in law or fact. While the federal regulation providing for automatic expiration of the permit does not apply, there is no disagreement that Utah Admin. Code R307-401-18, does apply. That regulation states:

> Approval orders issued by the Executive Secretary in accordance with the provisions of R307-401 will be reviewed 18 months after the date of issuance to determine the status of construction, installation, modification, relocation, or establishment. If a continuous plan of construction, installation, modification, relocation or establishment is not proceeding, the Executive Secretary may revoke the approval order.

In its Motion for Summary Judgment, Sierra Club simply misstates the facts. As previously indicated, Sierra Club's motion is the result of Sierra Club's unjustifiable reliance on an administrative record which would not be expected to contain information on the 18 month review. A review of the relevant time period demonstrates that the Executive Secretary did in fact comply with R307-401-18. On January 13, 2006, IPSC sent a letter to the Executive Secretary explaining the current status of the IPSC project. In that letter, IPSC outlined its belief that its permit conditions were valid and requested an extension of the 18 month period. The Executive Secretary reviewed this letter and responded affirmatively. *See* Exhibit C, attached. Therefore, the Executive Secretary was provided with the necessary knowledge of the "status of construction, installation, modification, relocation, or establishment" of the IPSC project. Utah Admin. Code R307-401-18. Consequently, the Executive Secretary used his discretion in not revoking the Approval Order. Therefore, Sierra Club's assertion that the Executive Secretary failed to comply with the regulation is without a factual basis.

CONCLUSION

Based on the foregoing, the Executive Secretary opposes the amendment because the proposed amendment is without legal or factual basis and would not withstand a motion to

dismiss. Accordingly, the Executive Secretary respectfully requests that Sierra Club's Motion to amend its Request for Agency Action be denied

Dated this 5th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2007, a true and correct copy of the foregoing Executive Secretary's Motion for Partial Judgment on the Pleadings was mailed, postage prepaid, and/or emailed to the following:

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